JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 19, 1971. No petition for rehearing was filed by petitioners.

STATEMENT

A. Preliminary Statement

The Petition has been filed to review a Per Curiam Order of Affirmance (A. D1)[2] issued by the Fifth Circuit Court of Appeals per Circuit Judges Wisdom, Ainsworth and Bell under Rule 21[3] of the Rules of that Court. Such an Order amounts to a certification by the Court of Appeals that findings of fact by the District Court are not "clearly erroneous", that "no error of law appears", *and "that an opinion would have no precedential value."* The Fifth Circuit Court of Appeals does not cavalierly make such determinations, as its opinion fully explaining the reasons for the usage of the rule makes plain. *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970).

> "By Rule 21 the Court * * * is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value. Having to make unanimously that explicit decisive determination, and implicitly,

[2]The symbol "A." followed by the letter and numeral refers to the page of the decisions of the Court of Appeals and District Court as reproduced in the petition. The symbol "R." refers to the appendix in the Court of Appeals.

[3]See footnote 1, *supra*.

> the further one that circumstances or factors, other than precedential value, do not make an opinion essential or appropriate, the Court, by the adoption of the Rule, affirms that it must be carefully and selectively employed. 430 F.2d at 972.

On the basis of such a certification by the Court of Appeals issued after exhaustive briefing and oral argument, petitioners seek to persuade this Court that plenary Supreme Court review is appropriate by using the same kind of innuendo and baseless assertions which they have utilized to this point in the case to no avail. *Petitioners make not a single reference to the record in their entire Petition.*

Respondents, Nehemiah Mungin, et al., are more than one hundred members of the class of locomotive firemen who have, as have petitioners, already received substantial benefits from and desire to maintain the compromise and settlement reached with the FEC, approved and reapproved by the District Court and the Court of Appeals. Given the type of allegations contained in the Petition counsel for respondents deem it appropriate to reply in some detail to the charges and "rumors of irregularities", (Pet., p. 22) which are the asserted bases of the Petition.

B. Background of the Case

The background of the case is related in the Court of Appeal's initial opinion, reversing the District Court's dismissal of the complaint, *Mungin v. Florida E. C. Ry. Co.*,

416 F.2d 1169 (5th Cir. 1969) (A. C 1-18). It should be noted, however, that with the exception of the factual findings which appear of record in the Court orders and opinions referred to therein, the remaining allegations (including those relating to FEC's conduct vis-a-vis its locomotive firemen and the response of the individual locomotive firemen) are simply that, allegations in the complaint. The provability of these allegations particularly with reference to individual conduct was never, of course, put to the test of proof, nor were any defenses which FEC might have interposed to eliminate or minimize its liability formally plead or tested.

This suit was filed by seventy-five locomotive firemen represented by the undersigned counsel. This group of firemen, which comprised the vast majority of persons actively employed by FEC as locomotive firemen in January 1963, included the petitioners as well as the respondents.

At the time the suit was initially filed (November, 1967) and dismissed by the District Court (April, 1968), *United Industrial Workers v. Galveston Wharves*, 400 F.2d 320, (5th Cir. August 8, 1968), *cert. den.* 395 U.S. 905 (1969), had not yet been decided. The basis of dismissal in the District Court was lack of jurisdiction based upon the alleged primary jurisdiction of the National Railroad Adjustment Board for any monetary claim. Since at the time the suit was filed and dismissed initially, no court had ever awarded monetary damages for a breach of the Railway Labor Act, and indeed the law in the Fifth Circuit was to the contrary, *Louisville & Nashville R. Co. v. Brown*, 252 F.2d 149 (5th Cir. 1958); *cert. den.* 356 U.S. 949 (1959), the issue of the plaintiffs standing to sue did not

arise until the jurisdiction of the District Court to award back pay became clear with the *Galveston Wharves* decision.

In the initial *Mungin* opinion the Court of Appeals dealt specifically with the problem of the standing of individual employees to proceed against the FEC. In the final conclusion to this opinion, the Court stated:

> "Consequently, with a suit of multiple, but individual, parties comprising a substantial number of the members of the craft, we hold that it was a claim for individual relief and, even more so, a claim on behalf of the entire craft whether represented or not." 416 F.2d at 1178. (A. C18).

By this language it was apparent that in conferring standing to sue upon the group of individuals who comprised the plaintiffs, the Court was imposing upon the group the duty to represent "the entire craft whether represented or not." *Id.* Thus while the case had come to the Court of Appeals as a suit on behalf of seventy-five FEC firemen, it left the Court of Appeals as a suit which necessarily encompassed the interests of the approximately two hundred persons who held seniority as locomotive firemen with FEC.

In the opinion of counsel the only appropriate manner to carry out the mandate of the Court and to maintain "a claim on behalf of the entire craft whether represented or not", *Id,* was by the procedural device of a class suit. In examining the provisions of Rule 23, Fed. R. Civ. P., it was and is apparent that the present case fitted precisely within the categories of a "True" class suit pursuant to Rules 23(a), 23(b) (1) (A) and (B) and 23(b) (2).

In this case an excellent compromise class action settlement, fair, adequate and reasonable for all concerned in light of all of the attendant circumstances, is under attack by a small group of individuals, who have waited until after they and all other entitled members of the class had received cash in hand pursuant to the judgment and settlement before asserting any objection to the entire settlement.[4]

The attack sought to be raised in the Petition is focused not upon the settlement itself however, but upon alleged conflicts of interest and improper representation by counsel for the locomotive firemen, together with the procedures followed in the District Court. These attacks are wholly without merit. There was no conflict of interest, nor any improper representation by counsel, and the procedures followed in the settlement of this necessarily class action were fair and reasonable for all.

It is hardly to be expected in the resolution of a complex and difficult labor matter involving two of the most bitter and complex situations recently affecting the railroad industry, the elimination of firemen and the protracted FEC disputes, that every individual affected would be wholly satisfied with the outcome.

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[4]All of the petitioners were among the members of the class who received monetary benefits from the settlement. The petition cites (Pet. p. 20) the example of the petitioner who received the lowest amount, $5,287.00, based upon his having the lowest pre-strike earnings. The petitioner who received the highest amount was Moses Meeks at $12,058.10, based upon his having the highest pre-strike earnings. The average share received by the eight petitioners was $8,400.00. (R. 67-75).

C. The Compromise Proposal

The settlement proposal reflected a careful appraisal of the various factors affecting the possible amount of recovery, if any, *e.g.*, the fact that the FEC dispute was a strike and as to each individual an open question was if and when the individual would have refused to honor the picket lines of striking employees and returned to work for the carrier, *Raabe v. Florida E. C. Ry. Co.*, 259 F.Supp. 351 M.D. Fla. 1966 (R. 274). Other factors were: the physical condition of the men, many of whom actually had disabilities and/or were advanced in years, actually 20 of the class had retired and several more had died since 1963; the outside earnings of the men, virtually all of whom had obtained substitute employment, and over one-third of whom had returned to railroad employment with the FEC (R. 226; 273-4); the necessity, if recovery had been cast specifically as "time lost", for the repayment of previously received railroad unemployment benefits, 45 U.S.C. §352(f); the elimination of passenger service by FEC drastically reducing the jobs available for firemen; the unlikelihood of the recovery of punitive damages. Giving due consideration to these factors, the monetary settlement equal to two full years of an estimated post-strike firemen's payroll, without any deductions, was approximately equivalent to the amount which might have been ultimately recovered in court. Other factors to be considered which might have severely impaired liability were the possibility of Supreme Court review of the basis of liability (this Court has never ruled upon the availability of the "back-pay" sanction under the Railway Labor Act or the collective standing of individuals in the context of a "major dispute"); other available defenses by the FEC, including a contention regarding the statute of limitations, and pre-strike agreements under which the FEC claimed the right to eliminate many, if not all, firemen.

A separate agreement which was dependent upon the final approval of the settlement was also to be concluded between FEC and the International Association of Railway Employees (IARE)[5] which would eliminate the job classification of locomotive firemen for the future, but would provide job opportunities for all qualified employees holding firemen's seniority in the other operating crafts of FEC such as engineer, trainmen, conductor, etc.

As on many southern railroads, during the pre-strike era on FEC there was racial discrimination which limited Negroes to jobs within the class of locomotive firemen in operating employment. The ordinary railroad practice of promotion from fireman to engineer had been limited in its pre-strike application to white employees. In the post-strike era FEC had eliminated racial discrimination in this regard and had promoted many returning firemen to engineer and other operating positions. While it was undoubtedly FEC's need for experienced personnel who would cross picket lines which prompted this change, it did, nonetheless, have this beneficial effect. The December 30, 1969 agreement codified and protected the status of returning firemen who had been promoted and maintained the opportunity for continued railroad employment for any individual holding firemen's seniority who desired to do so. In addition each fireman who became an engineer or who accepted other operating positions would have as his seniority date his original date of hire and not the date of his recent promotion. One effect of this provision was to overcome the years of discrimination.

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[5]IARE is the labor organization which was the collective bargaining representative for FEC's locomotive firemen.

D. Formulation of the Compromise Proposal

Following the denial of the FEC's petition for rehearing to the Court of Appeals on October 16, 1969, FEC requested a stay in the District Court while it sought review of the decision via a petition for certiorari to the United States Supreme Court. A hearing was held on this motion on Monday, December 22, 1969 and the District Court denied the requested stay, ordering the FEC to respond to the complaint on or before January 30, 1970 (R. 19). In the afternoon following this hearing, the initial conference regarding the possibility of some settlement being reached in the case was held in Jacksonville between counsel and representatives of the FEC. (R. 182).

At this meeting and subsequently, it was firmly stated that FEC was interested in a settlement only if it could actually transfer settlement funds prior to the end of the calendar year in order to take advantage of its unique tax situation for calendar year 1969. If this could not be accomplished FEC was not interested in settlement. (R. 182). Following this meeting, during the remainder of the week which included the Christmas holiday, telephone conversations were carried on between counsel concerning the outlines of a proper settlement. Nehemiah Mungin who was the leading spokesman for the class was contacted by counsel on December 26 and 27, 1969 and he advised that counsel should use their judgment in seeking what was best for the men. (R. 183).

On Sunday, December 28, 1969, counsel traveled to Atlanta to meet with FEC counsel and on Monday, December 29 at approximately noon the final outlines of the proposed settlement were reached. These included the

payment by FEC of $800,000.00 into a Trust to be administered under the direction of the Court. Shares in the trust were to be allocated to individuals in accordance with a formula which took into account their actual earnings as locomotive firemen in the pre-strike period, and their availability to perform service for the FEC during the post-strike period. Individuals who were deceased or had retired pursuant to the provisions of the Railroad Retirement Act were to receive proportionately reduced shares.

Another aspect of the settlement proposal was the formal maintenance of the suit as a class action, which had been required in the opinion of all counsel by the Court of Appeal's initial opinion in the case.

Following the determination of the outlines of settlement, General Chairman Carter and President Whitaker of the IARE were contacted by counsel on December 29th and advised of the settlement proposal. On December 30th they met with counsel in Jacksonville and agreed that the settlement proposal and the proposed collective bargaining agreement were fair, adequate and reasonable and merited submission to the men for their acceptance or rejection. On this date President Whitaker and General Chairman Carter authorized counsel to file an appearance on behalf of the IARE, to intervene in the suit on its behalf, and to take all steps necessary on behalf of the IARE as an entity to progress the settlement proposal in order that it might be presented to the firemen. Counsel did not ask for nor did they receive any fee from the IARE. The sole purpose of the formal participation by IARE in the suit was to enable the proposed compromise and settlement to be presented to all members of the craft for acceptance or rejection.

In order for the settlement proposal to be a possibility and to enable the funds to be actually transferred from FEC prior to the end of calendar year, 1969, on the afternoon of December 30, 1969 a hearing was held before Honorable Charles R. Scott, District Judge. At this hearing the documents which comprised the proposed settlement and compromise were presented to the Court and the settlement proposal was thoroughly explained to the Court, and preliminary approval of the settlement was granted by the Court. (R. 53). Specific provision was made in the Court's preliminary order for a formal notice (R. 78-9) of the proposed settlement to be given to every individual who held seniority as a fireman on FEC (which included many engineers who held dual seniority), including notification of each individual of his actual dollar share of the funds available if the proposed settlement were to be finally accepted by the men and approved by the Court.

E. Presentation of the Compromise Proposal

Conveniently, in the petition, petitioners make no reference whatever to the extensive meetings, discussions, correspondence and other communications between counsel and class members between the initial preliminary hearing on December 30, 1969 and the final hearing of March 11, 1970, a period of three and a half months. Petitioners would imply that the formal Notice of February 4, 1970 was the only information to which they had access prior to the final hearing. This is patently false.

Following the initial hearing of December 30, 1969, meetings were arranged to be held in Miami, New Smyrna

Beach, and Jacksonville on January 10 and 11, 1970 through the various IARE lodge officers.[6]

At these meetings, which were attended by all of the petitioners, the settlement proposal, including all of the considerations for and against it, were discussed and explained. (R. 250-1; 184-5). Every aspect of the proposal including all of the implications of the IARE agreement were thoroughly discussed, and every question was answered fully and to the best of counsel's ability. (R. 184-5). It was made perfectly clear that the settlement proposal was not final in any sense and it was up to the men to determine whether they desired to accept it or reject it. All were advised that the settlement proposal was made on the basis that it would have to be accepted by all of them or that it would be available for none of them, and that if by the objection of one or more individuals the settle-

[6]Through the progress of this suit since its inception in the summer of 1967 and indeed since 1965 when counsel first undertook the representation of most of the IARE membership in Florida, a principal means of communication between attorneys and clients have been meetings held in Miami and New Smyrna Beach and at times in Jacksonville. The principal places where FEC firemen live are Miami and New Smyrna Beach, where the two IARE lodges are located. In addition a few live in Fort Pierce and Jacksonville. (The FEC pre-1963 crew terminals, or division points, were Jacksonville, New Smyrna Beach, Fort Pierce and Miami). The meetings had been held from time to time during the litigation for the purpose of explaining and discussing various aspects of the litigation. These meetings were particularly important for men located on the north end of the system since counsel have their offices in Miami. Over the years at various times most Jacksonville and New Smyrna Beach firemen have conferred with counsel in Miami but it was obviously much easier for Miami men to come in to see counsel individually or in groups.

The meetings, however, were used as an addition to and not in lieu of the more conventional means of communication between attorneys and clients, such as correspondence, phone calls, office visits, etc., all of which were extensively used over the years and during the early months of 1970. (R. 184-6).

ment were blocked, it would be blocked for all. The one question which could not be answered at these initial meetings was the amount of money which each individual would receive as his share of the settlement funds, since this information was not yet available.

The data concerning pre-strike earnings of the entire class membership, and of their eligibility based upon the deaths and retirements of many class members was being assembled during the month of January and fed into a computer to determine the dollar amounts of every individual's share. (R. 62-75). At the meetings all were advised that they would receive a statement specifying the actual dollar amounts, along with the formal notice which each would receive concerning the final hearing. Each of the meetings closed with expressions of appreciation for the services of counsel.

Another meeting was held on January 15, 1970 in New Smyrna Beach and all of the considerations of settlement were again fully and thoroughly discussed. (R. 187-8). All during the remainder of the month of January and early February there were literally hundreds of telephone conversations between counsel and class members with regard to the settlement proposal, answering questions, explaining various aspects and ramifications of settlement, discussing the formula for distribution and individual shares, etc. (R. 185-6).

On February 4, 1970 the formal notice of hearing was mailed to every person holding firemen's seniority as of January 23, 1963. (R. 78-79). In addition, on February 4, 1970 letters were sent to each individual showing the actual amounts to be received by him pursuant to the settlement

proposal if finally approved. In the weeks following the sending of the February 4 Notice there were numerous telephone and in person conversations with many class members, and no opposition to the settlement proposal was expressed by any individual. Additional meetings were arranged for Miami and New Smyrna Beach prior to the final hearing which had been set for Wednesday, March 11, 1970.

At the Miami meeting attended by some 15 to 20 individuals, all aspects of settlement were again discussed. One individual expressed himself as being in opposition to the settlement, but that he did not wish to block settlement for everyone else, and would therefore accept it.

At the New Smyrna Beach meeting all factors concerning the settlement were again discussed. All were again advised that the settlement proposal was one which was a single settlement for the entire class, and that if the settlement were blocked through the objections of one or more individuals it would be blocked for all.

F. Final Hearing

At the final hearing on March 11, 1970, all of the petitioners were present in the courtroom. Three individuals, H. A. Crump, W. J. Howard and Leandrus Jorden testified.

The attitude of the Court and the position taken by these individuals is very clearly expressed in the following colloquy between Judge Scott and Mr. Crump:

"THE COURT:

Well, do you want me to look after you and block the settlement as far as all the others are concerned?

MR. CRUMP:

No, I don't want you to do that.

THE COURT:

Well, tell me what you want me to do.

MR. CRUMP:

I'm asking you to ask the defendant to compensate me additional money to make it a fair settlement for me.

THE COURT:

How can I do that when they've already paid the money, $800,000.00 into the registry of the Court, and if I require them to do that, then the whole settlement is gone, it's blown up, it's out the window, and you all can start over again and figure out what you want to do, if anything, and see if, as and when you get your money. I don't know, but you're the one that's going to have to make that decision. If you tell me you want the whole settlement blocked, why I'll give consideration to it.

MR. CRUMP:

> *I don't want to tell you that. There are too many men sitting up here who are happy with their settlement* but as I said, I feel that my case was different and this is why I made the complaint." (R. 103-4). (Emphasis supplied)

This was the position taken by individuals who wished to be excluded from the settlement prior to its final approval on March 11 by Judge Scott. Judge Scott clearly approached the matter with a completely open mind, as the transcript of hearing plainly reflects. (R. 85-133). The heart of the matter is that not a single member of the class, including the 125 who received compensation and some 75 others holding seniority who did not receive a share of the settlement funds, none of whom are among the petitioners, raised an objection which they wanted to have considered as a basis for blocking the settlement for all. (R. 251). Under these circumstances there can be no doubt whatever that Judge Scott acted appropriately in approving the settlement and entering final judgment to that effect on March 11.

G. Post Judgment Proceedings

The settlement called for the initial payout of $300,000.00 to the individuals entitled to benefit on April 1, 1970. These checks were issued on March 31, 1970 and distributed by mail to all persons benefited. In the interim between March 11 and the April 1 distribution there was still no indication whatever of opposition to the settlement.

As was later revealed (R. 203-9, 247), the petitioners waited until every person had received his first share of the settlement funds, prior to making any effort whatsoever to express disapproval or dissatisfaction with the settlement which might block it for all. Indeed, the petitioners first effort to contact anyone with regard to opposition was delayed until April 4, 1970, well after cash was actually in hand. A notice of appeal was filed on April 10, 1970 and it was only upon receipt of this notice of appeal that any indication of opposition to the settlement was given to counsel for the respondents.

Following the filing of the Notice of Appeal, on May 29, 1970 the petitioners together with several other individuals filed a Motion for Relief from Judgment under Rule 60(b). The petitioners filed a Motion to Stay the proceedings in the Court of Appeals until the District Court had had an opportunity to rule on their Motion for Relief from Judgment. Respondents did not oppose that stay which was granted on June 11, 1970.

A hearing was held on the Motion for Relief on June 29, 1970, after which the Court took the matter under advisement and called for briefs. On August 11, 1970 the District Court issued its Findings of Fact and Conclusions of Law (R. 245-275), denying the Rule 60(b) motion. No Notice of Appeal was filed by the petitioners directed to the denial of their 60(b) Motion.

The Court of Appeals entered its Per Curiam affirmance of the District Court on April 19, 1971. (A. D1).

ARGUMENT

The decision below, a Per Curiam Affirmance by the Court of Appeals under its Rule 21, correctly deciding the appeal and certifying "that an opinion would have no precedential value",[7] clearly does not warrant the grant of certiorari by this Court.

The thinnest of veneers is applied in the Petition as alleged reasons why this Court should exercise its discretion to review the decision below. The Petition consists of wholly unfounded assertions of "near scandal" and "rumors of irregularities", the sole thrust of which are that the decision below was incorrect. No conflict of decision is presented, nor any issue of general importance and the decision below was eminently correct.

The crux of the dispute here is really a matter of conflicting legal advice given to the petitioners. The petitioners were advised by their counsel (Milledge and Horn) prior to the final hearing that the Court of Appeals decision was not a decision on the merits of their case, and that numerous legal and factual defenses remained to be tried, as well as possible review by the Supreme Court of the basis of jurisdiction, standing to sue, and back pay liability. They were advised that as a result of the representative capacity specified in the Court of Appeals opinion by virtue of which they had standing to sue, all members of the class would have to be included in the law suit and in any settlement. They were further advised that the proposed compromise and settlement was fair, adequate and proper as a resolution of the dispute in

[7]See footnote 1, and text at pp. 4-5, *supra*.

light of all the circumstances and taking into account the varying circumstances of all members of the class. Finally they were advised that the proposed settlement and compromise was a single offer to settle with all, which could be accepted or rejected, but that if the settlement were blocked for one it would be unavailable for all.

This advice, which we submit was proper and correct, led to final approval of the settlement by the Court, on March 11, 1970, with not one person opposing the overall settlement either in communication to counsel (R. 186) or to the Court. (R. 251).

On April 4, 1970 following final judgment, after the receipt of their initial settlement benefits on April 1, 1970, pursuant to the final judgment, and after every member of the class had similarly received benefits, the petitioners first sought to retain other attorneys who ultimately advised them that the Court of Appeals decision was a decision on the merits,[8] that the liability of the FEC was "clear" and "certain",[9] and that the sole matter remaining in the lawsuit was the determination of damages.[10] They were advised that a class action was not required, was improper, and that each individual had had a right to "opt out" of the class action and to proceed individually and separately against the FEC.[11] This position was later retracted by petitioners' counsel in the District Court, (R. 217, 237-8). They were advised that the amount of settlement was grossly inadequate, based upon the prayer

[8]Transcript of Hearing, June 29, 1970, p. 69. (R. 220-1).

[9]Ibid., p. 63, 70. (R. 219, 221-2).

[10]Motion for Relief from Judgment (R. 139).

[11]Ibid. (R. 138).

for relief in the complaint.[12] Finally they were advised that they could keep the settlement benefits which they had already received, while simultaneously seeking to set the settlement aside,[13] and that it might be possible to set the settlement aside for some of the class without affecting the settlement for others.

This advice and these representations of petitioners' counsel are erroneous, but form the basis for petitioners alleged desire to destroy the settlement.

A. *The Petitioners, Prior to Final Judgment and the Receipt of Benefits by all Entitled Class Members, Never Communicated to Counsel or to the Court a Position in Opposition to the Settlement in its Entirety which might have Blocked the Settlement for All.*

A false theme running throughout the Petition is that the petitioners "opposed" the compromise and settlement, or "dissented" from it, or "challenged" it prior to their receipt of funds pursuant to its terms on April 1, 1970. The fact of the matter is that not a single member of the class including all of the petitioners raised any such "opposition", "dissent", or "challenge", if this would mean that the settlement and compromise would be unavailable for all other members of the class (R. 251).

The record reflects that the petitioners neither prior to nor at the final hearing sought to block the settlement proposal, but rather the three individuals who testified

[12]Ibid., (R. 139).

[13]Ibid., (R. 140).

at the Final Hearing expressed a desire to have individual treatment accorded to them if such could be granted by the Court without blocking settlement for all. (R. 251). This position was faithfully communicated to the Court by their counsel, and the Court repeatedly asked these individuals if they desired to block the settlement for all. The question of the acceptance or rejection of the compromise proposal was a completely open question at the final hearing of March 11, 1970.

All of the class were fully advised and completely aware of the basis of the settlement proposal which was a settlement for all or a settlement for none. A sense of loyalty and community of interest and the overwhelming support of the class for the settlement proposal was accepted by all as the consensus prior to April 1, 1970, and upon which counsel and class members alike acted.

The assertion is made by counsel for petitioners that the petitioners were "abandoned" by their attorneys prior to the final hearing. There is no basis whatever for this assertion. No one prior to April 4, 1970 and the receipt of sums in settlement by the entire class, opposed the settlement, upon the basis which they were correctly advised by counsel, that the suit was necessarily a class action, and that the settlement was for all or for none.

At no time prior to or during the final hearing did any class member make any statement to counsel, or to the court that he desired to have his individual request for separate treatment, if possible, considered as a basis for blocking the settlement for all. There were no "opponents", "dissenters" or "challengers" to the settlement in its entirety until after the final judgment and the disbursement

of funds to all. The timing of their sudden, apparent change of position once they had their cash in hand on April 4, 1970 goes far to show that no opposition to the settlement for all was contemplated by petitioners at least until after they and everyone else had secured the benefits of settlement.

B. *The Formal Notice sent to Every Class Member Over a Month Prior to the Final Hearing, Including the Advice as to the Actual Amount He Would Receive Pursuant to the Settlement Proposal if Finally Approved, Was Proper and Adequate.*

The Petition alleges that a defect in the procedure followed in the District Court was the form of the formal notice sent to every individual member of the class, pursuant to Rule 23(e). In this connection they cite *Birnbaum v. Birrell*, 17 F.R.D. 409 (S.D.N.Y. 1955) a case where the Court found that a formal notice simply published in New York 10 days prior to the Final Hearing was inadequate for 7,500 stockholders scattered throughout the country.

Petitioners assert that the effect of the notice sent to each class member over a month prior to the Final Hearing (A. E 1-3) was to "chill" (Pet., p. 18) their response and to shift a "burden of proof" from the "proponents" of the settlement to the "dissenters".

First, of course, there were no "dissenters" to the compromise and settlement prior to the entry of the final judgment and the initial payment of $300,000.00 to the class on April 1, 1970. The individuals who testified at

the final hearing were entirely in accord, at that time, that they did *not* want their request to be treated individually to be taken as opposition which might have the effect of blocking the settlement for all. (R. 251). The colloquy between the Court and appellant Henry Crump set out at pp. 17-18 *supra*, makes the position of those who testified perfectly clear. If their requests for individual treatment could not be accorded without blocking the settlement for all, they did *not* want to stand in the way of the settlement.

The effort made in the Petition (Pet., p. 17) to make it appear that Judge Scott was less than completely courteous, fair and open-minded at the final hearing is utterly without basis, as the transcript of hearing (R. 85-133) fully shows.[14]

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[14] *E.g.*, Addressing Mr. Crump (See Pet., p. 17) the Court stated:

THE COURT:

* * * "I've got your letter, I'm happy that you are here this morning. I think it's good that you're able to say what you've got in back of your mind and say how you feel because this is a free American Country and it's good that we can do it this way, but you're the one that's going to have to make the final decision. And let the attorneys ask you some questions if they care to and I'll hear from you further, unless there is something more you have to say now.

* * *

MR. CRUMP:

I appreciate you giving me the opportunity to express myself.

THE COURT:

That's all right, I'm glad that we have that kind of a way of life in this country and I hope it's always with us.

MR. CRUMP:

Thank you, this is a democratic society. (R. 105, 106).

Indeed, counsel for petitioners when presenting their Motion for Relief from Judgment admitted that based upon the record before him Judge Scott acted correctly in entering final judgment.[15]

C. *There was no "Conflict of Interest" Between the Class and its Collective Bargaining Representative. Counsel did not Represent Adverse or Conflicting Interests.*

The final allegation of defect contained in the Petition was an alleged "conflict of interest" on the part of counsel who represented both the class members and their collective bargaining representative, IARE. There was no "conflict of interest".

IARE filed its motion to intervene and complaint seeking the identical relief in virtually the identical language with that filed in behalf of the class. IARE as the duly designated collective bargaining representative under the Railway Labor Act was the sole entity empowered to enter into collective bargaining agreements with the FEC. As a part of the proposed settlement, IARE entered into an agreement with the FEC which abolished the position of locomotive firemen for the future, and accorded the right to promotion to an operating position with the FEC to employees holding firemen's seniority.

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[15]Transcript of Hearing, June 29, 1970, p. 62 (R. 218).

"MR. CAPELLE:

I think, insofar as you have stated, that the Court, based on the information it had before it, made a correct decision. We have no argument that you overlooked some point or that you acted wrongfully."

Notice that this agreement was a part of the settlement was formally contained in the February 4, 1970 Notice and it was fully discussed in the meetings held prior to the Final Hearing. IARE became a party to the suit and at all times was in accord that the settlement proposal which was finally approved by the Court on March 11, 1970 was fair, adequate and reasonable for the class. IARE authorized counsel who had been retained by the class members to appear for it.

Petitioners make vague reference to "other litigation" (Pet. p. 19) as showing some basis of conflict. Judge Scott who had decided that other litigation, *Harrison v. F.E.C.*, No. 65-366-Civ-J (M.D. Fla. 1967) specifically found that "No showing of I.A.R.E. bad faith was made in that case, but apparently I.A.R.E. acted in good faith, albeit without proper authorization." (R. 261).

IARE's agreement to join in the submission to the class of a plan of settlement hardly makes it a party adverse to the class composed of its members. Clearly in this litigation, IARE as an entity, and its members were not "adverse parties", and counsel did not, in any sense, represent "adverse parties".

The possibility that some plaintiffs might wish a particular settlement and some might not is always inherent in the representation of multiple plaintiffs and the possibility increases as the number of plaintiffs increase. It is nowhere suggested however that counsel should not have undertaken to represent substantially all the locomotive firemen. Certainly petitioners consented to this multiple representation.

If there had been dissension prior to or at the final hearing involving opposition to the entire settlement where some plaintiffs desired to settle and others did not a potential situation of conflict would have existed.

The answer is simply that as of the final hearing there were no dissenters to the entire settlement. No one who testified, nor *anyone* else wished to oppose settlement, if, as a consequence thereof, settlement for the entire class would be denied.

CONCLUSION

In the Rule 60(b) proceedings in the District Court, the facts were developed which demonstrated that each of the petitioners had accepted and retained the first payments under the terms of the settlement and final judgment. (R. 253-5). Not one of the petitioners has actually tendered the funds or checks which they have received back into the registry of Court or to the Trustees of the settlement fund. The net effect of this failure to return the benefits, is to permit the petitioners to enjoy the benefits of settlement and final judgment while simultaneously seeking to destroy them for all. The consequences of setting aside the settlement and final judgment to the more than one hundred class members who have received and used the benefits of settlement in reliance upon the petitioners consent to settlement at the final hearing and petitioners acquiescence thereafter until all class members had received their compensation would be disastrous in fact. There was no disbursement "in the face of known dissent" (Pet. p. 21) as alleged in the Petition. The record shows that petitioners made no effort to express dissent to anyone, or even to attempt to contact other attorneys until April 4, 1970, after all had cash in hand.

There is no issue worthy of review presented by this case. Fair and adequate notice of the proceedings accompanied by proper advice of counsel led to the approval of the compromise and settlement with no class member opposed to the entire settlement. Counsel represented no conflicting or adverse interest from that of the plaintiffs and the class represented, and in no sense "abandoned" anyone.

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief in Opposition was delivered by air mail this _____ day of September, 1971, to the following counsel:

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